# Does my CGL Policy Cover That? The Bullet Point: Volume 2, Issue 22

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## Commercial General Liability Insurance Coverage

### *Ohio Northern Univ. v. Charles Const. Servs., Inc.*, Slip Op. No. 2018-Ohio-4057.

This appeal concerned whether a general contractor's Commercial General Liability Insurance (CGL) policy covers claims for property damage caused by a subcontractor's faulty work.

In 2008, Ohio Northern University (ONU) contracted with the appellee to build a conference center on campus. The appellee promised to do all work on its own or through sub-contractors. Appellee retained CGL coverage from the Cincinnati Insurance Company (CIC) that included clauses and terms related to work performed by subcontractors. After the job was completed, ONU discovered that the conference center suffered significant water damage from hidden leaks, ultimately determined to have been caused by defective work by a subcontractor. The repair cost over six million dollars.

Eventually, ONU sued the contractor who sued various subcontractors. Appellee also submitted a claim for coverage under the CGL to CIC. CIC eventually intervened in the suit and sought a declaratory judgment that it did not have to defend the appellee. Eventually the trial court issued judgment in favor of CIC and ONU and the appellee appealed. On appeal the Third Appellate District reversed, and found that the coverage language was ambiguous as to whether it covered property damage caused by subcontractors' work.

On appeal, the Supreme Court reversed and ultimately decided that an insurer is not required to defend the CGL policy holder against suit by the property owner or indemnify the insured against damage caused by the sub-contractor.

***The Bullet Point:*** This case is an extension of Westfield Ins. Co. v. Custom Agri Systems, Inc., 133 Ohio St. 3d 476, 2012-Ohio-4712, where the Supreme Court held that an insurance claim filed by a contractor under its GCL policy for property damage caused by the contractor's own faulty workmanship does not involve an

"occurrence" such that the CGL policy would cover the loss. In applying the rules of contract interpretation, which require courts to give effect to the intent of the parties to the agreement, the Supreme Court found that the GCL policy at issue also only triggers coverage for property damage when there is an "occurrence." As in Custom Agri Systems, faulty work from a subcontractor is not considered an "occurrence" covered by the GCL policy because it is not based in fortuity.

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## Ohio Choice of Law

### *Premium Freight Management, LLC v. PM Engineered Solutions, Inc.*, 6th Cir. No. 18a0224 (Oct. 10, 2018).

Bosal Industries-Georgia, the appellant, unhappy with powdered metal flanges it had purchased under a contract with PM Engineered Solutions, Inc., switched suppliers and terminated the contract. Eventually, the defendant sued appellant for breach of contract and violation of Connecticut's Unfair Trade Practices Act. After a five day bench trial, the defendant was awarded damages under both theories, including over $700,000 in attorney's fees and over $216,000 in damages. Both parties appealed.

On appeal, the Sixth Circuit Court of Appeals affirmed, finding that under Ohio Choice of Law provisions, Connecticut law applied and under Connecticut law, deceptive conduct can extend to simple breach of contract claims when accompanied by intentional misrepresentations.

***The Bullet Point:*** In Ohio, when there is a choice between two different state laws, the law of the forum state (Ohio)'s choice of law provisions apply. Under Ohio law, there is a two-step process for determining choice of law issues. The first step is to determine if an actual conflict between the state substantive laws exist. If so, the court considers the second step, which, in tort claims, requires the court to apply the law of the state with "the most significant relationship to the occurrence and the parties." This requires a court to consider the following factors:

(1) the place of business of the parties;
(2) the place where the injury occurred;
(3) the place where the conduct causing the injury occurred;
(4) the place where the relationship, if any, between the parties is centered; and
(5) any factors under Section 6 that [the court] may deem relevant to the action.

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## Specific Performance

### *Northwest Ohio Properties, Ltd. v. County of Lucas*, 6th Dist. Lucas No. L-17-1190, 2018-Ohio-4239.

This was an appeal of the trial court's summary judgment decision in favor of Lucas County. The appellant owns 60 acres of land in Lucas County. Near its property was a subdivision that was being developed. The subdivision did not have access to a sanitary system.. To add one, a sewer line would have to be installed underground on ten feet of appellant's property. A one-page agreement was signed permitting the sewer line to be installed provided there was no cost to the appellant. The county refused the "free tap" agreement and appellant then refused to allow the subdivision access to the property for the sewer line and filed suit. Eventually, the court granted Lucas County summary judgment and ordered appellant to specifically perform its duty to give access to the property for the sewer line.

Appellant appealed and on appeal, the Sixth Appellate District affirmed finding that the contract was valid and enforceable, and the court did not err in ordering appellant to specifically perform its contractual duties.

***The Bullet Point:*** Specific performance is not a cause of action; rather, it is a remedy that is available for breaches of certain contracts. In order to be entitled to specific performance under a contract, the following elements must be met: "'The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court.'"

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## Want of Consideration

### *Home Savings Bank v. Loeffler*, 5th Dist. Stark No. 2018CA00032, 2018-Ohio-4223.

This case involved a trust with three beneficiaries, including the appellant. Throughout the years loans were made to the trust beneficiaries from the trust assets with the expectation that they would be paid back. Appellant borrowed over $224,000 from the trust but only paid $57,000 back. Appellant eventually filed bankruptcy but never listed the trust loans as assets. He then entered into an agreement to convert the loans to a non-interest bearing loan subject to payment from his beneficiary interest. Eventually suit was filed on the note after demand for payment went unmet, and appellant argued the note was void for lack of consideration. The court eventually granted the trustee summary judgment and appellant appealed.

On appeal the Fifth Appellate District affirmed, finding that there was adequate consideration to support the non-interest bearing note.

***The Bullet Point:*** Consideration may consist of either a detriment to the promisee or a benefit to the promisor. A party may defend against having to pay under a promissory note by arguing failure or want of consideration for the note. However, "the law presumed the existence of consideration for a promissory note, and this presumption continues until it is shown that there was none; and the burden of showing this is on the party attacking the note for want of consideration.'" Thus, lack of consideration is an affirmative defense on which the defendant bears the burden of proof.